

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**





75-1336

UNITED STATES CIRCUIT COURT OF APPEALS  
SECOND CIRCUIT

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B 7cc  
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

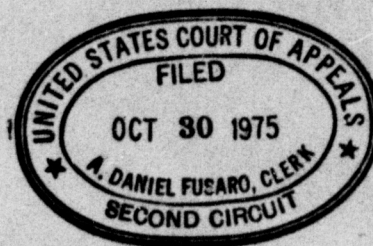
RICHARD SIMONS,

Defendant-Appellant

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BRIEF AND APPENDIX

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UNITED STATES CIRCUIT COURT  
FOR THE SECOND CIRCUIT  
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UNITED STATES OF AMERICA,

-v-

RICHARD SIMONS,

Defendant-Appellant  
-----

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
-----

UNITED STATES OF AMERICA,

Appellee,

-against-

RICHARD SIMONS,

Defendant-Appellant  
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Preliminary Statement

This is an appeal from a decision of Hon. Marvin E. Frankel of the United States District Court for the Southern District of New York, dated August 7, 1975, which has not been officially reported. A copy of the decision is included in the appendix (A-6&7 )

Statement of Facts

In January of 1974, upon a plea of guilt to a conspiracy charge of manufacture, distribution and possession of amphetamines, the appellant was given a five year maximum sentence pursuant to 18 U.S.C. 4208(b)', the precise nature of the sentence to await a report of the Director of the Bureau of Prisons after a detailed psychiatric examination (A- 8 )

Between January and May of 1974, appellant was given such an examination at Lewisburg Penitentiary. The resulting report found that the appellant was suffering from severe psychiatric disturbance and, in addition, was addicted to amphetamines, and that a treatment program, rather than prison, would be in order. Based on that report, with the concurrence of probation officers, appellant was sentenced to three years' probation in the custody



of Odyssey House, a psychotherapeutic addiction treatment center.<sup>1</sup>

(A- 9 ). Pursuant to that order, defendant reported to Odyssey House on May 13, 1974. What happened at Odyssey House is nowhere in the record, but that same evening Odyssey House concluded that it was not equipped to treat appellant and sent him to Bellevue Hospital Psychiatric Ward where he remained for three weeks and was diagnosed as paranoid schizophrenic.

On June 3, 1974, appellant was brought directly from Bellevue for resentencing. Through his court-appointed attorney, appellant pled guilty to a violation of probation the nature of which is not in the record. The transcript of that hearing (A- 19 through 37 ) makes clear that appellant expected, through this plea, that he would be sent for psychiatric treatment in a hospital.<sup>2</sup> However, instead of receiving such treatment, he was sent to Danbury Prison where he remains to this day (despite the expectation of the court below [A- 7 ]).

In July of 1975, appellant commenced the within proceeding pursuant to 28 U.S.C.2255 to review and correct the 4208(a)(2) sentence which he was given upon his foregoing plea (A- 11 ) upon the bases

a. that he was not in fact guilty of any violation of probation but so pled: i. to secure medical and psychiatric treatment

ii. because he was under heavy sedation at the time of plea

b. that he is in effect jailed because of mental illness

c. that at the time of sentence, the court was unaware of

Parole Board guidelines with regard to (a)(2) sentences

d. that the sentence imposed on May 13, 1974 of four years' imprisonment plus three years' probation exceeded the maximum five year sentence upon which his original guilty plea was based.

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1. It is unclear why appellant was sent to a treatment center for heroin addicts as his addiction was to amphetamines.

2. He also was under heavy sedation at the time (A- 22 )

The Southern District Court denied relief (A-6&7 ) from which denial appellant duly appealed to this Court (A-5).

#### Questions Involved

1. Is there any basis in the record for appellant's plea of guilty to a violation of probation?
2. Did the Court adequately examine the mental condition of appellant before accepting his plea of guilty?
3. Was appellant adequately apprised of the consequences of his plea? If not, was the plea in fact voluntary?
4. Should the court have accepted defendant's plea knowing he was under heavy sedation?
5. Has the court illegally and unconstitutionally sentenced appellant to prison for mental illness?

#### The Law

There is no dispute that a 2255 proceeding may be brought at any time. Indeed, it can be brought even after a sentence has been fully served. Gates v. U.S., (C.A.Ill. 1975) 515 F.2d 73. This was not disputed either by the Attorney General or by the Court below. The attorney general did question the propriety of a 2255 proceeding being brought under the original docket number rather than as an independent suit, citing United States v. Huss, Docket No. 75-1192 (July 25, 1972, C.A.2d.Cir.). The court below took no position on this issue, nor does appellant except to state that this is, at worst, a clerical oversight which can be corrected by assigning a new docket number to the case, and certainly no reason to continue appellant in prison if he is otherwise entitled to be released.

The law is clear that there must be a factual basis for any plea of guilty contained in the record. U.S. v. Gearin (C.A.Ga.1974),



496 F.2d 691; Santobello v. N.Y., (1971), 92 S.Ct. 495, 404 U.S.253. The only "charge" in the record concerning the alleged violation of probation is that Odyssey House was incapable of treating appellant (A-15 ). It is respectfully submitted that this may have been a reason to transfer probation custody from Odyssey House to another treatment facility, but certainly no reason to imprison appellant for violating terms of probation. His responsibility was to report to Odyssey House and submit to their program which he undisputedly did. The fact that Odyssey House concluded that they did not have adequate facilities to treat appellant certainly was in no way appellant's fault. Thus, on the simple basis that no violation of probation is on the record, the June 3, 1974 resentencing must be reversed.

However, that is but one reason for reversal. If anything was clear at that hearing, it was that appellant, coming directly from Bellevue Hospital Psychiatric Ward where he was diagnosed as paranoid schizophrenic, might well not be capable of comprehending the nature and consequences of his plea. Under such circumstances, the court was obligated to conduct an inquiry into his state of mind before accepting any plea. Calabrese v. U.S., (C.A.Mass. 1974), 507 F.2d 259; Sailer v. Gunn (D.C.Cal. 1974), 387 F.Supp.1367. The court having failed to inquire into this, it could not determine whether appellant was in mental condition to enter a plea voluntarily (Sieling v. Eryman, (C.A.Ariz. 1973), 478 F.2d 211) and with any awareness of its consequences. Mathis v. State of N.Cal. (D.C.N.Cal. 1967), 266 F. Supp. 841

The situation in the case at bar is compounded by the fact that appellant, apart from being paranoic schizophrenic, was under heavy sedation at the time the plea was entered, as the court

was quite aware. Strangely, the only questions concerning the nature and extent of sedation were posed to appellant himself, scarcely the person to determine whether or not the sedation was such as to make a plea invalid. It is clear that a plea while under the influence of narcotics is void. Harris v. U.S., (C.A.Ky. 1970), 426 F.2d 99, U.S. v. Malcolm (C.A.N.Y.1970), 432 F.2d 809. The effect of a narcotic or a sedative, insofar as ability to enter a plea is concerned, is precisely the same.

Beyond this, it is clear that to the extent that appellant comprehended the plea at all, he believed it was being entered in order for him to be sent to Springfield Hospital for Psychiatric Treatment (A 24 - 26 , 30 ). For any plea to be valid, its consequences must be clear -- U.S. v. Bronson, (C.A.Kan. 1971), 449 F.2d 302, cert. den. 92 S.Ct. 1268, 405 U.S. 944; Smith v. U.S. (C.A.Ky. 1968) 420 F.2d 860 -- and must not be induced by promises (in the case at bar of psychiatric treatment) which deprive the act of its voluntary character. U.S. ex rel Rose v. Folette (C.A.N.Y. 1968), 395 F.2d 721. It is obvious that appellant did not have the slightest reason to believe, even had he not been a heavily sedated paranoid schizophrenic that his plea would result in anything but his being sent for adequate psychiatric treatment.

It should be pointed out, in passing, that the fact that appellant had court-appointed counsel in no way eliminated the court's obligation to determine that the plea was, in fact, voluntary and with knowledge of its consequences. Gundlach v. U.S. (C.A.Cal. 1958), 262 F.2d. 72; U.S. v. Davis (C.A.Ill. 1954), 212 F.2d 264.



It is impossible to conclude. from any review of the record that appellant has been imprisoned for anything other than his mental illness. The Lewisburg examination center found him mentally ill which is why he was given probation in custody of Odyssey House. Odyssey House found his mental illness beyond their capacities and so sent him to Bellevue Psychiatric Ward. Bellevue found him very severely mentally ill. Even Judge Frankel, whose sentence has already effectively imprisoned appellant for over a year and a half, clearly realized the nature of appellant's problem, as is clear throughout the transcript, and seemed himself to believe that the sentence was a way of sending appellant for psychiatric treatment. Imprisonment for mental illness is clearly illegal. In such situations the court has an obligation to see that the mentally ill person is hospitalized, not imprisoned. Overholser v. Lynch (1961), 288 F.2d 388, rev. on other grounds, 82 S.Ct. 1063, 369 U.S. 703; U.S.ex rel Curtis v. Otis (D.C.N.Y. 1972), 344 F.Supp. 728, aff. 466 F.2d 1092, cert. den. 93 S.Ct.1405, 410 U.S. 945. Indeed, beyond being illegal, it is cruel and unusual punishment in violation of the Eighth Amendment to the Constitution ( Maatallah v. Warden, Nev. State Prison, 470 P.2d 122, 86 Nev. 430 (1970) ) to imprison for illness.

The sentence in this case upon the alleged violation of probation also constituted a cruel and unusual punishment as being grossly disproportionate to the act involved. Four years in prison plus three years probation is certainly a cruel and unusual punishment for not having the type of psychiatric condition that conforms to an agency's treatment program. U.S. v. Gerhart (D.C.W.Va. 1967), 275 F.Supp. 443; Haines v. Kerne (C.A.Ill. 1974), 492 F.2d 937 Willoughby v. Phend (D.C.Ind. 1969), 301 F. Supp. 644

On a very different ground from all of the above, the sentence upon violation of probation must be reversed because the sentencing judge, at the time he imposed the 4208(a)(2) sentence was obviously unaware of parole board attitudes towards such sentences. He believed that this allowed for parole at any time (A - 29 ) while, in fact, attitudes of parole boards are no different towards (a)(2) sentences than they are towards any others. Kortness v. U.S., 514 F.2d 167 (8th Cir.1975). See also U.S. v. Slutsky, 514 F.2d 1222 (2d.Cir. 1975). Indeed, in the Court below, the Attorney General agreed that the sentence should be re-evaluated in light of the above decisions (A- 16 ) but the Court nonetheless chose not to do so.

For all of the above reasons, the Court should not have accepted appellant's plea of guilty to a violation of probation on June 3, 1974 because (1) nothing happened which constituted a violation of probation; (2) appellant was in no mental condition to enter any plea. Moreover, the plea was clearly induced by an expectation of psychiatric treatment rather than imprisonment. Furthermore, the judge sentenced appellant under 4208(a)(2) under a misapprehension as to the guidelines used by the parole boards. Thus, Mr. Simons should have been given the relief requested upon his 2255 motion, and the determination below should be reversed.

Because it is clear on the record that Mr. Simons in fact committed no act in violation of probation, and because he has been imprisoned for a year and a half, rather than remanding the matter for a further hearing, in the interests of justice, the court should direct that Mr. Simons be released and returned to probation status forthwith in custody of an appropriate psychiatric treatment center.



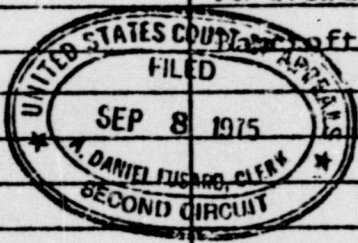
Contrary to the opinion of the court below (A- 7 ), there is no reason why that center should be Odyssey House: appellant is undisputedly no longer addicted, and so an addiction treatment center would be meaningless. However, there are scores of psychiatric treatment centers in the New York City area known to the probation department which could more than adequately service appellant. If the court requires specific recommendation, as the opinion below implies, the Brooklyn Center for Psychotherapy has indicated its willingness to admit appellant.

At the very least, the time appellant has been wrongfully imprisoned should be credited to his probationary period. In all justice, since imprisonment is obviously a more severe punishment than probation, appellant's sentence should be reduced to time served.

  
BRADLEY S. DAVIS  
Attorney for Appellant

JUDGE FRANKEL

73 CRIM 799

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: 264-63 44
VS.	For Plaintiff: <u>Robert Littlefield, Jr./</u>
PAUL KATZ (Cts. 1, 2 & 4)	
WALTER SCHWARTS (all cts.)	
RICHARD SIMONS (ct. 1)	
RICHARD GALLAGHER (ct. 1)	
VICTOR SAWCHUK (cts. 1, 2, 3, 4 & 5)	
GAYLE SHERMAN (cts. 1, 2 & 4)	For Defendant:
	P. Katz - William Leibovitz 51 East 42nd St. NYC 867-0180
	W. SCHWARTZ - Rubin, Gold & Geller 299 B. Way NYC 233-3330
	V. SAWCHUK - David S. Greenfield, Esq. 115 B. Way NYC

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
2, 1, 5, 8, 4, 6, 3					
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
METHAMPHETAMINE, Dist. & Poss. with intent to dist. Sch. II AMPHETAMINE (Cts. 2 & 4) & METHAMPHETAMINE (Cts. 3 & 5) Ti. 21:841(a)(1) & 841(b)(1)(A) & 2					
Possession of a firearm (Ti. 5861(-) CT. 6) Firearm unregistered (d) CT. 7) Construction of firearm (f) CT. 8) - Conspiracy so to do (Ct. 1) Ti. 21:846)					
EIGHTH COUNTS					

DATE	PROCEEDINGS
8-16-73	Filed Indictment.
	Bench warrants ordered as to defts Simons, Gallagher & Sawchuk. Wyatt, J.
8-16-73	Bench warrants issued.
8-27-73	Deft. Schwartz (atty. present) Pleads not guilty. Deft. continued on bail previously fixed by the Magistrate. (Bail \$10,000.)
	Deft. Katz (atty. present) Pleads not guilty. Continued on bail fixed by Magistrate \$25,000. P.R.B. secured by 10% cash.
	Deft. Sherman (atty. present) Pleads not guilty. Continued on bail of \$15,000. P.R.B. previously fixed by Magistrate.
	Deft. Simons (atty. present) Pleads not guilty. Continued on bail fixed by Magistrate. (\$15,000. P.R.B.)
	Deft. Sawchuk (atty. present) Pleads not guilty. Bail fixed at \$1,000. P.R.B.



DATE	PROCEEDINGS	CLERK'S FEES			
		PLAINTIFF		DEFENDANT	
8-27-73	Ten days for motions as to all defendants. Case assigned to Judge Frankel for all purposes. Wyatt, J.				
8-27-73	VICTOR SAWCHUK - Filed Personal recognizance bond in the sum of \$1,000..without security.				
8-30-73	WALTER SCHWARTZ - Filed notice of motion & afdvt. for a bill of particulars				
8-31-73	WALTER SCHWARTZ - Filed order extending bail limits to Hilton Head Island, S.C.				
9-6-73	PAUL KATZ - Filed notice of motion & afdvt. for suppressing evidence, for bill of particulars & discovery and inspection. Ret. 9-14-73				
9-6-73	GAYLE SHERMAN - Filed notice of motion & afdvt. for dismissal of the first, second and fourth counts, for a bill of particulars, for discovery and for a severance...Ret. 9-14-73..				
9-7-73	PAUL KATZ ) V.SAWCHUK ) Filed notice of appearance (See front sheet) W.SCHWARTZ )				
9-13-73	P.KATZ - Filed afdvt. of William Leibovitz dtd. 9-12-73				
10-10-73	Filed affdvt. of B.Littefield, Jr. dtd. 10-4-73				
10-10-73	PAUL KATZ Filed memorandum #39895..The motion for a severance is denied** The Govt. has consented to supply most of the particulars. As to discovery, the Govt. has given broad consent...No settlement is necessary....Frankel, J. Mailed notice.				
10-10-73	G.SHERMAN-Filed memo endorsed on motion filed 9-6-73 The motion to dismiss is***unfounded***excepty as consented to the particulars is denied,** the motion for severance is denied...So ordered Frankel, J.				
10-10-73	W.SCHWARTZ - Filed memo endorsed on motion filed 8-30-73 The Govt. will supply particulars sought in items 31 thru 35***The items of discovery to which the Govt. has consented are sufficient. No more need be given So Ordered Frankel, J.				
10-18-73	Pre-trial conference held...Frankel, J.				
10-29-73	R.GALLAGHER - Filed affdvt. of B.Littlefield, Jr. AUSA for a Writ...				

## DOCKET ENTITIES

73 Cr. 799

.3.

Frankel, J.

DATE	PROCEEDINGS
10-30-73	R.GALLAGHER - No atty.produced in Court by writ. Court enters a plea of not guilty. writ adj'd
	WALTER SCHWARTZ - Atty.present. Withdraws plea of not guilty and enters plea of GUILTY to counts 1,2,3 & 5 Court accepts plea, orders a P.S.I. AND sets 12-11-73 for sentence. Cont'd. on present bail. Counts 4,6,7 and 8 open.....Frankel, J.
11-8-73	R.SIMONS - Atty.present. Withdraws plea of not guilty and enters plea of GUILTY to indictment(Count 1) Court accepts plea, orders a P.S.I. and sets Jan.14-74 for sentence..Cont'd on present bail.....Frankel, J.
11-9-73	R.GALLAGHER - Filed CJA appointment of David V.Keagan 114 Old Country Rd.Mineola,N.Y. Goettel, Mag.
11-20-73	P.KATZ - Atty.present. Withdraws his plea of not guilty and enter a plea of GUILTY. Court accepts plea order a P.S.I. and sets Jan.8,1974 for sentence. Cont'd. on present bail....Frankel,J.
11-20-73	P.KATZ - Filed acknowledgment of rights.
11-27-73	V.SAWCHUCK-Atty.present.withdraws plea of not guilty and enters a plea of guilty to count 1 Court accepts plea orders P.S.I. and sets Jan.15-74 for sentence Counts 2 thru 5 open...Cont'd R.O.R.....Frankel, J.
11-27-73	V.SAWCHUCK - Filed acknowledgment of rights.
12-11-73	W. SCHWARTZ-Filed Judgment ( Atty present) The imposition of sentence is suspended Defendant is placed on probation for a period of Three (3) years, subject to the standing probation order of the Court. Counts 4,6,7, and 8 dismissed on motion of de counsel with the consent of the Government. Frankel, J. Docketed on 12-12-73.
1-9-74	GAYLE SHERMAN - Filed order that subpoenas be issued for service upon Custodian of Records, 4 B.C.I. 400 Broome St. NYC Frankel,J. Notice mailed.
1-15-74	G.SHERMAN - Certificate that debt will be ready for trial on scheduled date.
1-17-74	PAUL KATZ - Filed Judgment(William Leibovitz,atty.present)It is adjudged imposition of prison sentence suspended. Debt is placed on probation for a period of THREE(3)YEARS, subject to the standing probation order of this Court.....Frankel, J.....Docketed 1-21-74
1-17-74	VICTOR SAWCHUK - Filed Judgment(David Greenfield,atty.present)the debt is sentence as a YOUNG ADULT OFFENDER pursuant to Section 5010(a)of Ti. 18, U.S. Code, as extended by Section 4209 of Ti.18, U.S.Code.. Imposition of prison sentence suspended. Debt is placed on probation for a period of TWO YEARS, subject to the standing probation order of this Court.....Counts 2,3,4 and 5 dismissed on motion of debt's counsel with the consent of the Govt....Frankel, J. (Docketed 1-21-74)

See Page 4



## DOCKET ENTRIES

73 Cr. 799

Page 4

Frankel, J.

DATE	PROCEEDINGS
1-17-74	RICHARD SIMONS - Filed Judgment (Atty. present) the deft is committed for imprisonment pursuant to Section 4208(b) of Ti. 18, U.S. Code, for study, report and recommendations as described in Section 4208(c). This commitment deemed to be for the maximum sentence prescribed by law, to wit: FIVE YEARS, unless altered by the Court pursuant to said section upon the receipt of the report and recommendations. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the Court within THREE(3) MONTHS....Frankel, J. (Docketed 1-21-74)
1-28-74	Filed transcript of record of proceedings dated 11-8-73...
1-28-74	Filed transcript of record of proceedings dated 12-11-73.
1-10-74	R. GALLAGHER - Atty. present. produced on writ..... Deft G. SHERMAN atty. present... JURY TRIAL commenced.
1-11-74	Trial cont'd.
1-14-74	Trial cont'd.
1-15-74	Trial cont'd. JURY VERDICT NOT GUILTY as to GALLAGHER... Writ satisfied.
1-16-74	Trial cont'd.
1-17-74	Trial cont'd.
1-18-74	Trial cont'd - JURY UNABLE to reach verdict as to deft SHERMAN - MISTRIAL... Deft moves for directed verdict of acquittal - Decision reserved... Frankel, J.
1-22-74	<del>Ent</del> Filed Bill of particulars....
1-30-74	Deft SHERMAN - Motion for ACQUITTAL granted on all counts.... Frankel, J.
1-31-74	Filed transcript of record of proceedings, dated OCT. 30-73
1-28-74	Filed transcript of record of proceedings, dated NOV. 20-73
1-25-74	R. Simmons - Filed commitment with marshals return.. Deft delivered to F.D.H. on 1-17-74..
1-21-74	R. GALLAGHER - Filed and mailed CJA #20 to A.O.
1-22-74	R. GALLAGHER - Filed writ with marshal's return.. Writ adjd to 1-9-74... Carter, J.
4-26-74	R. SIMONS - Filed affdvt. of D.H. Murphy, II AUSA in support of a writ.
5-13-74	RICHARD SIMONS - Filed Judgment (Atty. Robert Mitchell, present) and having on 1-17-74 been committed pursuant to Section 4208(b) of Ti. 18 USC for study, report and recommendations... The Court having now received the report It is Adjudged that the imposition of sentence is suspended... Deft is placed on probation for a period of THREE YEARS, subject to the standing probation order of this Court. SPECIAL condition of probation being that the deft be enrolled in the Residential Treatment of ODYSSEY HOUSE 207 East 57th St. NYC BEGINNING promptly today.. Deft is to remain as a resident under this program until he is deemed eligible for release by those in charge of the program or until a determination is made by the Probation Office or the Court that he may withdraw from that residence... During this period deft is not to function as an informant or to have any connection with dangerous or narcotic drugs or the traffic therein..... FRANKEL, J..... Ent. 5-15-74.... Copy given to U.S. MARSHAL & MAILED TO BUREAU OF PRISONS.
5-13-74	R. SIMONS - Mailed original CJA copy 1 to A.O. for payment.... Frankel, J.

(Cont'd. Page 5)

## DOCKET ENTRIES

73 Cr. 799

Page 5

Frankel, J.

DATE	PROCEEDINGS
6-3-74	RICHARD SIMONS - Filed Judgment atty. Robert Mitchell present. Probation dated May 13, 1974 is revoked and suspension of imposition of sentence vacated. The deft is committed for imprisonment for a period of FOUR YEARS. Pursuant to the provisions of Section 4208(a)(2), Tl.18, U.S.Code, the defendant may become eligible for parole at such time as the Parole Board may determine....Pursuant to Section 841 of Tl.21, U.S.Code, the deft is placed on Special Parole for a period of THREE YEARS, to commence upon release from confinement.....Frankel, J.....Ent.6-5-74-----
6-3-74	RICHARD SIMONS - Filed Probation order for issuance of a bench warrant..Frankel, J.
****	
5-31-74	R. SIMONS - Filed W/H/C with marshal's return.
7-30-74	Filed transcript of record of proceedings, dated 1-3-74
7-12-74	Filed transcript of record of proceedings, dated 1-30-74
8-5-74	RICHARD SIMONS-Filed true lcopy of writ of habeas corpus with Marshal's return Writ satisfied on 5-13-74.
12-13-74	WALTER SCHWARTZ - Filed the following papers received from Mag.Raby: docket entry sheet, Criminal Complaint, S.D.N.Y., Disposition sheet, and Appearance Bond.
12-17-74	PAUL KATZ and GAYLE SHERMAN - Filed the following papers received from Mag.Raby: docket entry sheet, Criminal Complaint, S.D.N.Y., Disposition sheet, Appointment of Counsel, Notice of Appearance, and Appearance Bonds(2).
12-13-74	VICTOR SAWCHUK - Filed papers received from magistrate, Docket sheet, indictment warrant, disposition sheet and appointment of counsel.
7-14-75	RICHARD SIMONS... filed deft's affdvt. and notice of motion for an order correcting the sentence pursuant to Title 28 U.S.C. 2255.
8-1-75	Richard Simons - Filed affdvt. of J.G. Epstein, AUSA in <del>xxxx</del> opposition to motion to vacate.
8-8-75	RICHARD SIMONS - Filed memorandum opinion #42949 I have considered in detail the motions dated July 14-75****I conclude that there is no just or useful purpose to be served by any revision in the sentence at this time.**in sum the motion should be and it is denied.....Frankel, J. m/n
9-2-75	RICHARD SIMONS - Filed order that the time for the deft to appeal from order entered 8-8-75 is extended until 30 days after entry of said order....Frankel, J... m/n
9-5-75	RICHARD SIMONS - Filed notice of appeal from order entered on 8-8-75...Copy given to U.S. Atty's office.



OPINION BELOW

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

RICHARD SIMONS,

Defendant.

73 Cr. 799

MEMORANDUM

FRANKEL, D.J.

I have considered in detail the motions dated July 14, 1975, on behalf of this troubled defendant. Leaving aside that the form of the proceeding seems incorrect, I have thought again about the merits of Mr. Simons's situation, not omitting the procedural questions as to revocation of his probation, but concentrating also on the difficult questions as to how he should be - or should have been - sentenced.

As to the revocation proceeding, given the extraordinary circumstances and the thorough consideration Mr. Simons received for sentencing purposes, I perceive no occasion for relief, under 28 U.S.C. §2255 or otherwise. It is not technically vital, but it may be humanly relevant, to wonder what good such relief would be at this late date. Having served so much of his sentence, Mr. Simons would not be much

OPINION BELOW

helped by starting all over again the question whether his probation should have been revoked and, if not, whether he should (1) be "assigned" again to the private facility which quickly found him unacceptable, (2) after all come back to stand trial, or (3) renew his admission of violation. Counsel for Mr. Simons, whose papers include no brief, does not specify with particularity the course he would recommend in this respect.

The court was aware when Mr. Simons was sentenced of the imperfect procedures attending 18 U.S.C. §4208(a)(2). The court was also aware of continuing pressures upon the Board of Parole, before and after Mr. Simons was sentenced, to improve the Board's approach to that provision. Employing that subsection only rarely, I thought it would at worst not do injury to Mr. Simons.

In any event, having reconsidered that subject, having addressed specifically the guidelines as they affect him, and being aware from the files that his chances for parole within the next few months seem excellent in the absence of any deterioration in his behavior or his situation, I conclude that there is no just or useful purpose to be served by any revision in the sentence at this time.

In sum, the motion should be, and it is, denied.

So ordered.

Dated, New York, New York

August 7, 1975

*Martin E. Frankel*

A-7 U.S.D.J.



# United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

JAN 23 1974

79152-158

United States of America

v.

No. 73 CR 799

RICHARD SIMONT

On this 17th day of January, 1974, came the attorney for the government and the defendant appeared in person and by Robert Mitchell, Esq.

IT IS ADJUDGED that the defendant upon his plea of guilty and the Court being satisfied there is a factual basis for the plea

has been convicted of the offense of unlawfully, intentionally and knowingly combining, conspiring, confederating and agreeing with others to violate Sections 812, 811(a)(1) and 811(b)(1)(D) of Title 21, U.S. Code. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly manufactured, distributed and possessed with intent to distribute Schedule I controlled substances in violation of Sections 812, 811(a)(1) and 811(b)(1)(D) of Title 21, U.S. Code.

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of pursuant to Section 4205(c) of Title 18, U.S. Code, for study, report and recommendations as provided in Section 4205(e). This commitment deemed to be for the maximum sentence prescribed by law, to wit: FIVE (5) YEARS, unless altered by the Court pursuant to said section upon the receipt of the report and recommendations.

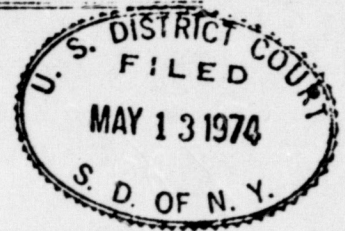
The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the Court within THREE (3) MONTHS.

IT IS ADJUDGED THAT

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

**United States District Court**  
FOR THE

SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

v.

RICHARD SIMONS

No. 73 CR 799

On this 13th day of May, 1974, came the attorney for the government and the defendant appeared in person, and by Robert Mitchell, Esq.

IT IS ADJUDGED that the defendant upon his plea of guilty and the Court being satisfied there is a factual basis for the plea

has been convicted of the offense of unlawfully, intentionally and knowingly combining, conspiring, confederating and agreeing with others to violate Sections 812, 841(a)(1), and 841(b)(1)(B) of Title 21, U.S. Code. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly manufactured, distributed and possessed with intent to distribute Schedule II controlled substances in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, U.S. Code,

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted, and having on January 17, 1974, been committed to the custody of the Attorney General or his authorized representative pursuant to Section 4208(b) of Title 18, U.S. Code, for study, report and recommendation, and the Court having now received and considered the report of such study; it is adjudged that the imposition of sentence is suspended. Defendant is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. Special condition of probation being that the defendant be enrolled in the Residential Treatment of Odyssey House, 207 East 57th St., New York, New York, beginning promptly today. Defendant is to remain as a resident under this program until he is deemed eligible for release by those in charge of the program or until a determination is made by the Probation Office or the Court that he may withdraw from that residence. During this period defendant is not to function as an informant or to have any connection with dangerous or narcotic drugs or the traffic therein.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

RECORDED  
MAY 16 1974

MARVIN E. FRANKEL

United States District Judge.

RAYMOND F. BURGHARDT

Clerk.



No. 73 GR 799

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and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, probation dated May 13, 1974 is revoked and suspension of imposition of sentence is vacated. It is adjudged that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 2000 (1) YEARS.  
Pursuant to the provisions of Section 4208(a)(2), Title 18, U.S. Code, the defendant  
may become eligible for parole at such time as the Parole Board may determine.

Assigned to Section 811 of Title 21, U.S. Code, the defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon release from custody etc.

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Medical Center for the Deaf  
1000 10th St  
St. Louis, Mo 63101

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V.

SUPPORTING 73 Cr. 799  
AFFIDAVIT Affidavit

RICHARD SIMONS

STATE OF CONNECTICUT ) ss:  
COUNTY OF FAIRFIELD )

Richard Simons, being duly sworn, deposes and says: I am the defendant in the above matter and as such fully familiar with the facts hereinafter set forth. I make this affidavit in support of my motion pursuant to 28 U. S. C. 2255 to review and correct the sentence imposed upon me for an alleged violation of probation on June 3, 1974.

The background of the matter is as follows: On January 17, 1974, after my plea of guilty, I was sent to Lewisburg penitentiary for psychiatric evaluation. On May 13, 1974, on the basis of that evaluation which found that I had serious psychological problems as well as a problem of drug usage, I was sentenced to three years' probation in custody of Odyssey House. I reported to Odyssey House that same day, but, for reasons set forth below, was sent by Odyssey House to Bellevue Hospital psychiatric ward. I remained there until June 3rd, 1974, and was found by them to be a paranoid schizophrenic. On June 3rd, I was returned to Court: I had been accused by Odyssey House of a violation of probation. Without my knowledge or consent, my court-appointed counsel pled me guilty to the charge, and I was sentenced to and under Section 4208 (a) (2) of Title 18 of the U. S. Code a term of four years' imprisonment to be followed by three years' special parole. Since that time I have been incarcerated and am now at Danbury FCI in Danbury, Connecticut.

I believe that my sentence of June 3, 1974, should be reviewed and corrected for the following reasons:

- (a) I was not in fact guilty of any violation of probation on May 13, 1974.
- (b) The Court was unaware of the Parole Board guidelines at the time my (a) (2) sentence was imposed.
- (c) I have, in effect, been sentenced to jail for mental illness.
- (d) My sentence of four years' imprisonment plus three years' special parole exceeds the maximum sentence imposed when I pled guilty.

What actually happened on May 13, 1974, is as follows:  
I reported to Odyssey House as I was directed by the Court to do. Obviously I would not have reported if I had any serious intent to violate the conditions of my probation. By coincidence, one of the people who had testified against me also was at Odyssey House. He told the director that he was in fear of his life because of my supposed anger, (I should point out that I have been a professional weightlifter, and so I suppose had a somewhat formidable appearance. Nonetheless, my intention was to serve my probationary sentence, and certainly not to get into any difficulty on the very first day of sentence.)

On the first evening I was at Odyssey House, I had a migraine headache. This is a condition to which I am prone, as the accompanying affidavits make clear, and which, furthermore had been exacerbated by a serious head injury I had suffered at Lewisburg only a few months before at 3:52 A.M. on March 6, 1974, (Lewisburg medical records should substantiate this). Apparently, there was some sort of group therapy meeting scheduled for that evening. I was asked to attend the meeting, but said I could not because of my headache and asked to be left alone for a few hours.



The Director was told not only that I refused to attend the meeting, (in reality even that was untrue: the truth was that I was physically unable physically to attend the meeting), but that I had threatened a fellow patient with harm of a physical nature. When I was called to the Director's office, I explained what had in fact happened, but he said that he knew the person who reported the threat for six months and me for not even six hours, and therefore he would have to believe the other person. On that basis, he called Bellevue, and later reported me to have violated probation.

I would have said all of this at the June 3rd hearing, (had I been in mental condition to do so), except that I was given no opportunity to do so because my court-appointed attorney, Robert F. Mitchell, without my knowledge or consent, stipulated the correctness of the probation report, thus, in effect, entering a plea of guilty on my behalf.

Moreover, even were I guilty of what was charged, the record is extremely clear that I was suffering from severe mental illness. Bellevue Hospital psychiatric ward, where I was until the day of the probation revocation hearing, found that I was paranoid schizophrenic and specifically stated that jail would be no solution for me. Had my illness been physical, (and, as the accompanying Bureau of Prisons report sets forth, that may well be the situation), no one would have thought of sending me to jail. I certainly would not have been given four years' prison for contracting pneumonia, but I was in fact given four years' prison sentence for being paranoid schizophrenic. I believe that I needed psychiatric treatment at that time, and I still believe that I could use such treatment, but I do not think that my sickness is something for which I should be punished.

Further, I wish to state that I am a  
strongly recommends out patient treatment.

The third reason why I believe review of sentence is in order is that I do not believe that the sentencing judge was aware of the Parole Board guidelines at the time an (a) (2) sentence was imposed upon me. I believe that the judge believed that under as (a) (2) sentence, I would be eligible for parole at any time, but in fact the Parole Board makes no distinction between (a) (2) and other sentences, and this in itself is sufficient grounds for review and modification of the sentence. I refer the court to the Second Circuit decision in U. S. V. Slutsky, (4/18/75, 17 Cr. Rep. 2122), and the Eighth Circuit decision in Kortness V. U. S., (4/21/75, 17 Cr. Rep. 2123). The second case is perhaps even more pertinent because it involves a motion under 28 U. S. C. 2255, and says that such a motion for this very reason can be made at any time.

Finally, I believe that the sentence I was given upon revocation of probation exceeds the maximum sentence for which I pled guilty. The January, 1974, initial sentencing said that regardless of the Lewisburg report, I would not be sentenced to more than five years. However, I have effectively been given seven years: four years prison plus three years special parole.

I believe that I still can use psychiatric treatment. I do not, however, believe that I need treatment at this point for drug addiction since I have been drug-free for over seventeen months in prison. I fully concur with the recommendation of the Bureau of Prisons which is attached hereto that I be given probation to the custody of a psychiatric treatment program. Since I have an apartment which has been maintained by my parents, I believe that outpatient treatment would be in order. My probation sentence was for a three year period. Since I have already served over a year in prison, I believe that whatever time I have served by the time I am resentenced should be deducted from this three-year probationary period.

I therefore respectfully pray that the relief requested be granted. No previous application for this relief has been made.

Respectfully submitted:

AFFIDAVIT IN OPPOSITION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA :

-v- :

RICHARD SIMONS, :

Defendant. :

AFFIDAVIT

73 Cr. 799 (MEF)

- - - - - X

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

JEREMY G. EPSTEIN, being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney in  
the office of Paul J. Curran, United States Attorney for the  
Southern District of New York and as such I am familiar with  
the above captioned action. I submit this affidavit in  
response to Simons' motion, pursuant to 18 U.S.C. § 2255,\*  
to vacate the sentence imposed June 3, 1974 for violation  
of probation.

2. Simons appears to make three distinct claims  
in his motion: (a) that he was found guilty of probation  
violation without ever admitting his guilt; (b) that this  
court imposed a sentence under 18 U.S.C. § 4208(a)(2)  
unaware of the Parole Board's release guidelines;

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\* If this is indeed intended as a § 2255 petition, it is  
improperly styled. The Court of Appeals has recently  
pointed out that a § 2255 proceeding is an independent  
civil suit, not an adjunct to the original criminal  
proceeding. United States v. Huss, \_\_\_\_\_ F. 2d  
Dkt. No. 75-1192 (July 25, 1975). The present application  
bears the docket number of Simons' original criminal case,  
and has not been filed as an independent civil action.



AFFIDAVIT IN OPPOSITION

(c) that the sentence imposed exceeds the maximum permissible under the statute.\*

3. Examination of the minutes of the proceedings before this Court on June 3, 1974 discloses that the first of Simons' contentions is meritless. Simons' lawyer did not, as he now claims, "plead him guilty"; on the contrary, Simons' was fully cognizant of the charges against him and fully willing to concede his guilt. The record discloses the following exchanges:

THE COURT: More importantly, you do feel aware enough of the situation, the grim situation and the circumstances?

DEFENDANT SIMONS: I understand, your Honor. I am very regretful of the incident in Odyssey House, and it happened and I will have to be put somewhere else, I recognize that. (Tr. 5)

\* \* \* \* \*

MR. MITCHELL: Your Honor, I think in order to protect the record the defendant technically would be entitled to a hearing on his violation of probation. He stood ready to admit to the charges. I think to protect the record both for myself and your Honor if the Clerk would read the charges he would admit his specification, having consulted with me, and that would obviate any possibility at a later date of him saying he didn't get a hearing on it.

THE COURT: All right. Do you understand that, Mr. Simons?

MR. SIMONS: Yes.

THE COURT: The charge is very simply, I don't even need bother the Clerk for this, that you have technically violated, as this thing says --

DEFENDANT SIMONS: Caused my own dismissal.

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\* Simons also contends that "I have, in effect, been sentenced to jail for mental illness," a claim to which we find a meaningful response difficult.

AFFIDAVIT IN OPPOSITION

THE COURT: More correctly be unable to fulfill the special condition of probation in that you have not been able to remain at Odyssey House for treatment of the kind that they had hoped they could give you but discovered they couldn't give you, and I take it that in this conversation you have agreed that that is correct.

DEFENDANT SIMONS: Yes, your Honor, but I think that --

MR. MITCHELL: Don't qualify it.

DEFENDANT SIMONS: I won't qualify it. I just think after I have been at Springfield for a while I will be ready to return to Odyssey House if they would be willing to accept me.

MR. MITCHELL: That has nothing to do with it.

DEFENDANT SIMONS: I am not disputing the charge.  
(Italics supplied) (Tr. 14-15)

4. We submit that the above quoted language effectively disposes of Simons' first contention. Moreover, Simons' frequent alert and intelligent responses to questions throughout the course of the hearing establish beyond question that he fully comprehended where he was and what he was doing.

5. Simons next claims that this Court imposed a sentence under 18 U.S.C. § 4208(a)(2) unaware that Parole Board guidelines often prescribe minimum sentences in excess of one third of the sentence imposed. See United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975). There is, at the threshold, a jurisdictional problem. Slutsky left open the question of whether a sentencing judge's misapprehension about the effect of his sentence is cognizable in a § 2255 petition, 514 F.2d at 1229.\* Nevertheless, Simons correctly

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\* The point was raised in Slutsky on a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.



points out that the Eighth Circuit in Kortness v. United States, 514 F. 2d 167 (8th Cir. 1975) has entertained a claim identical to his raised in a § 2255 petition. Although the Slutsky court expressed some doubt, we see no meaningful difference between a court's misapprehension over the effect of a sentence imposed and a mistaken impression concerning the defendant's criminal record, a defect clearly cognizable under § 2255, United States v. Malcolm, 432 F. 2d 809, 815-816 (2d Cir. 1970). Accordingly, we shall assume arguendo that Simons' petition properly vests jurisdiction in this court.

6. After analyzing the Parole Board guidelines, the Slutsky court concluded that "From the standpoint of an opportunity for early release, the (a)(2) prisoner is in no better position than a prisoner who has received a regular sentence." 514 F. 2d at 1229. The court further concluded that such a result could not be deemed consistent with the reasonable expectations of a judge imposing sentence under § 4208(a)(2).

7. In Slutsky, the Court of Appeals permitted the sentencing judge to reconsider his sentence in light of the Parole Board's policies. The Government has no objection to this Court conducting a similar reevaluation here.

8. Finally, Simons argues that the sentence imposed on him exceeds the statutory maximum because he received four years' imprisonment followed by three years' special parole. 21 U.S.C. § 841, of which Simons stands convicted, provides for a special parole term in addition to the period of incarceration imposed. This argument is therefore frivolous.

WHEREFORE, for all of the reasons stated herein,  
Simons' motion should be denied except to the extent  
consented to by the Government.

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JEREMY G. EPSTEIN  
Assistant United States Attorney

Sworn to before me this  
day of ,  
1975.

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TRANSCRIPT

mdrf

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

RICHARD SIMONS,

Defendant.

:

:

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:

:

73 Cr. 799

BEFORE:

HON. MARVIN E. FRANKEL

District Judge

New York, New York  
June 3, 1974 - 3:45 p.m.

APPEARANCES:

HENRY PUTZEL III, ESQ.,  
Assistant United States Attorney

ROBERT MITCHELL, ESQ.,  
Attorney for Defendant

ANTHONY O'HARE, JR.,  
Probation Officer

TRANSCRIPT

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2 (Case called.)

3 MR. MITCHELL: I didn't write the letter, Judge,  
4 because I was advised what had happened, that the warrant  
5 would be issued and he would be brought before your Honor.

6 THE COURT: The letter you refer to which you did  
7 not write to me, understandably, was to make a record which  
8 we now can make, of the fact that having been informed of  
9 Mr. Simons' experiences which made it impossible for  
10 him to be kept at the Odyssey House, and having learned  
11 that he was transferred from there to a state institution,  
12 I suppose Bellevue in the first instance, because of his  
13 emotional or mental condition, I had some question whether  
14 the situation presented problems for us under the judgment  
15 of the Court dated the 13th of last month which had placed  
16 Mr. Sions on probation on condition that he remain at  
17 Odyssey House.

18 And again without tracking the details of Mr.  
19 Simons' journeys from Bellevue to other institutions,  
20 I want it to be clear that you as his attorney, Mr. Mitchell,  
21 were aware of his situation and would be alert, as we knew  
22 you would be, to press any assertive rights he might have  
23 in those circumstances.

24 I think we agreed at that time that the effort  
25 of the state authorities on the reference from Odyssey



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2 House to be of use to Mr. Simons were not at war with any  
3 of his interests, but, as we hoped, might further his efforts  
4 to get himself organized.

5 DEFENDANT SIMONS: I desire therapy very much,  
6 your Honor. Excuse me for interrupting.

7 THE COURT: I understand that. I am just bringing  
8 us all up to date. I had asked Mr. Mitchell to reflect on  
9 your situation, Mr. Simons, overnight or over the weekend  
10 and to write me a letter with copy to the United States  
11 Attorney indicating whether he felt that your rights  
12 were being properly protected or whether he felt he should  
13 take some action on your behalf to dispute the conditions  
14 under which you were being held.

15 And now, unfortunately, I am advised -- I want to  
16 be more fully advised -- that you have not been found  
17 suitable for continued treatment in the state facilities,  
18 that the Odyssey House which had in addition I thought  
19 might be useful to you, does not consider that it is in a  
20 position to be helpful now, and so if that impression,  
21 or those impressions are correct we have to see what we  
22 can do to assist you and protect the public having in mind  
23 you have been convicted of a certain federal crime, in light  
24 of the understanding that the condition of probation  
25 that we set last month is not possible of fulfillment.

TRANSCRIPT

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2 Before I go on with Mr. Mitchell, or Mr. Simons,  
3 who is the most important person in interest here, is  
4 there anything you want to add or change, Mr. Putzel, about  
5 what I have said?

6 MR. PUTZEL: No, your Honor. Unless the Probation  
7 Department has anything to be added.

8 THE COURT: Mr. O'Hare has been keeping close  
9 watch on this, and I certainly will hear anything you have,  
10 Mr. O'Hare, that will fill out this matter.

11 MR. O'HARE: I think you are aware of everything  
12 at this time, your Honor.

13 MR. MITCHELL: There is one thing I wanted to add.  
14 The defendant is under sedation, but he says that that in  
15 no way interferes with his understanding what is going on  
16 at the present time. They found it necessary to sedate him.

17 THE COURT: What kind of sedation?

18 DEFENDANT SIMONS: 50 milligrams of Melaril;  
19 it is a mild sedative. Because I was somewhat apprehensive  
20 prior to coming to court.

21 THE COURT: Is that a more modern variant of  
22 Miltown or other tranquilizers?

23 DEFENDANT SIMONS: It is in the barbiturate  
24 family. It is Thioritsene.

25 THE COURT: My recollection is Mr. Simons has



TRANSCRIPT

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2 some knowledge of chemistry, which has not always stood him  
3 in good stead. In any event, you do know something about  
4 the nature of this drug?

5 DEFENDANT SIMONS: Yes.

6 THE COURT: More importantly, you do feel aware  
7 enough of the situation, the grim situation and the circum-  
8 stances?

9 DEFENDANT SIMONS: I understand, your Honor.  
10 I am very regretful of the incident in Odyssey House,  
11 and it happened and I will have to be put somewhere else,  
12 I recognize that.

13 THE COURT: Mr. O'Hare, it seems to me that the  
14 probation order that we worked up with the help of your  
15 office, and particularly Mr. Head's very earnest efforts,  
16 won't work any more. It seems to me we are on the verge  
17 of being compelled to revoke that probation order, in any  
18 event. That much I take it you would agree with.

19 MR. O'HARE: Yes, sir.

20 THE COURT: We have also been agreed that  
21 Mr. Simons needs some kind of assistance to try to get  
22 on an even keel by some form of therapy, and I have  
23 studied your case, Mr. Simons, more than judges get to  
24 study most cases. Although I am not sure you would be  
25 in agreement with this I am compelled to be absolutely

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2 convinced that you are not a candidate for non-residential  
3 treatment. That was one of the reasons we selected Odyssey  
4 House.

5 DEFENDANT SIMONS: It is an in-patient institution,  
6 your Honor.

7 THE COURT: Yes. And the short fact of this  
8 matter is that having committed a federal crime you are a  
9 federal responsibility and if we can't find a state  
10 facility to assist you we are compelled to rely upon a  
11 federal facility, and I am inclined to believe that it  
12 does no good to delay or temporize in this matter and I am  
13 disposed to think that we ought to impose a custodial  
14 sentence on Mr. Simons now or in the very, very near future  
15 so that he may begin to reside where he is going to have  
16 to reside for a while and receive such treatment and  
17 assistance as can be given him.

18 Mr. Simons, that is a matter in which you have  
19 a great interest so I will hear anything you want to say  
20 about that.

21 DEFENDANT SIMONS: Your Honor, what I would like  
22 to say is that I recognize that I am in need of residential  
23 treatment, but I hope ultimately to be transferred out to  
24 the Brooklyn Center of Psychotherapy and receive therapy  
25 twice a week which they have agreed to do, and I want to



# TRANSCRIPT

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be transferred to out-patient therapy ultimate twice a week. The center has agreed to do this. When the federal institution feels I am ready for it I would like to make an attempt to get back into Odyssey House. If not, then out-patient therapy.

THE COURT: I don't understand about this Brooklyn facility. You are not eligible to be treated there as an in-patient, are you?

DEFENDANT SIMONS: No, I am speaking of the future. I have been a patient there for six months and it has been paid for by Medicaid. I have been seeing analysts once a week. They agree with your Honor I need more extensive treatment, and have agreed to treatment twice or three times a week.

THE COURT: One of the problems is that so far as I know the most reasonable place for you to be sent in your condition, in the hope of getting you some genuine assistance, is the Federal Hospital at Springfield, and I don't know how that fits in with your plans with respect to Brooklyn as a matter of geography or otherwise.

I am sure that since the federal facilities are overtaxed if they could find some suitable installation that would alleviate their burden they would be interested in that.

TRANSCRIPT

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2 But how well Springfield can coordinate with  
3 Brooklyn I really don't know.

4 DEFENDANT SIMONS: What I wish to say is this:  
5 I recognize I am in need of residential treatment and I  
6 am perfectly willing to be kept there until such time they  
7 deem fit I can be transferred to out-patient therapy,  
8 which would then be paid for by Medicaid. This is  
9 my ultimate objective. My best friend is starting a  
10 company, MultiKinetics Industries, and I wish to work with  
11 him to assist him in his business. I have a work-study  
12 program planned for myself. I plan to study electronics.

13 THE COURT: Have in mind I am not a therapist,  
14 I am merely a judge.

15 DEFENDANT SIMONS: I understand that.

16 THE COURT: The reason I am here is that you are  
17 guilty of a federal crime.

18 DEFENDANT SIMONS: I understand that.

19 THE COURT: I am just telling you so that you  
20 will not feel that either of us is kidding the other of  
21 us so that we understand the limits of this relationship.

22 DEFENDANT SIMONS: Yes, your Honor.

23 THE COURT: Now, I can sentence you under a  
24 judgment that will allow the Board of Parole in consultation  
25 with the people at Springfield to order your release whenever



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they think you are ready, and that would be a matter for them to judge studying you and responding to whatever you do and say. To the best of my understanding that is about the best thing I can do for you.

DEFENDANT SIMONS: May I ask a question, your Honor?

THE COURT: Yes.

DEFENDANT SIMONS: Is the decision to release me at whatever time it occurs a group decision, no one man?

THE COURT: It is a Board of Parole decision.

DEFENDANT SIMONS: My point is there would be a psychiatrist in the same room, would there not, in communication with them?

THE COURT: Of course he would be in communication with them, I trust, in a case like yours where the underlying problems are so clearly psychiatric, but I am also telling you that I don't run the Parole Board, nor have I the power to do that, but that is -- it seems to me the best option available for the public and for you at this time.

DEFENDANT SIMONS: Your Honor, may I ask a question? If the psychiatrists deem me ready for outpatient therapy, wouldn't their statement be heard by the Parole Board and isn't there a fair chance of their

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accepting it? No guarantee, but a fair chance?

THE COURT: Yes, I would think so, but if either Mr. Mitchell or Mr. Putzel or I were to guarantee you anything we would be kidding you.

DEFENDANT SIMONS: I didn't ask you that.

THE COURT: Of course if they are rational people they would consider that. It is the most important thing for them to consider. If you are asking me to predict will they consider it --

DEFENDANT SIMONS: No, no.

THE COURT: -- I will, I would say yes, but I can't assure you.

Now, Mr. Mitchell, what enlightenment or different view are you able to offer in this situation?

MR. MITCHELL: That is the best that I could hope for for the defendant, that he be paroled when deemed eligible for parole by both the Parole Board and the institution with their recommendation.

The only thing that would bother me at the time, and I imagine is in back of the defendant's mind, is the length of the actual commitment.

THE COURT: That is always a matter of concern and interest. You were in Lewisburgh, when sent for study.



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2 DEFENDANT SIMONS: Yes.

3 THE COURT: You had some problems there?

4 MR.MITCHELL: Yes.

5 DEFENDANT SIMONS: There was an attempt on my  
6 life, your Honor. I still have the injuries resulting from  
7 the attack.

8 THE COURT: I appreciate that, and I am not without  
9 sympathy for it.

10 As to the length of the stay, the usual parole  
11 time in a federal court is one-third of your sentence. I  
12 am prepared, and I am pretty sure I am going to proceed  
13 soon, to sentence you under a statute that says that if you  
14 are ready, if you are ready, the Parole Board can let you  
15 out in less than a third, at any time. But again there  
16 is no guarantee that they will let you out in less than  
17 a third. That will depend upon how you function and how  
18 they appraise your situation.

19 At the upper end -- and this is why I will not  
20 remind you that I am sentencing you as a Judge and not  
21 treating you as a therapist -- at the upper end I have an  
22 obligation to protect the public. If you are not ready  
23 as quickly as you would like to be then the public is  
24 owed the protection of your not being let out too soon.

25 I have to give a long enough sentence to allow

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2 for that kind of leeway at both ends. Do you understand?

3 DEFENDANT SIMONS: I see the interests of both  
4 myself and the community are to be considered simultaneously.

5 THE COURT: That is the idea.

6 Mr. O'Hare, is there anything the probation  
7 office would wish to say at this time?

8 MR. O'HARE: No, sir. I think Springfield is the  
9 best place for him right now.

10 THE COURT: Mr. Putzel, you are relatively new  
11 to this case.

12 MR. PUTZEL: I just don't know, your Honor, whether  
13 this defendant will automatically go to Springfield. I  
14 would guess in light of what I hear here, which is really  
15 my first exposure to the case, that there is a  
16 substantial medical history which would require that,  
17 but sometimes what we all think is the only proper way  
18 for things to be handled is sometimes at odds with the  
19 prison system.

20 MR. MITCHELL: If your Honor could make a  
21 recommendation to the authorities that he be committed  
22 to Springfield I think that the Department of Prisons in  
23 Washington would follow that recommendation.

24 THE COURT: I think we can take care of that.  
25 Let's attend to the legalities of this situation..



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I am going to find and recite on this record that the probation imposed on Mr. Simons under the judgment of May 13, 1974, should be and must be and hereby is revoked.

I will simply note for the record, subject to correction by anybody, that this action taken today is based on a history of some weeks beginning with the discovery on the first night of his arrival at Odyssey House, that Mr. Simons couldn't suitably be kept there as a resident of that facility as the judgment and probation order of the Court had contemplated, that contrary to what he had hoped and we had hoped the facility there was not capable of coping with his needs, and evaluating his problems, that as a result without objection by the Court or our probation office or counsel Mr. Simons was transferred to a state facility for the emotionally disturbed at Bellevue.

Without reciting them all, other measures were taken there and elsewhere in state institutions to attempt to be helpful to Mr. Simons and to regulate his behavior in an acceptable way.

It was found that these efforts were not adequate, that the state institutions couldn't sufficiently copy. On Friday, which was May 31st, I was notified

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2 informally by Mr. O'Hare that the state institution --  
3 I guess again Bellevue -- was on the verge of returning  
4 Mr. Simons to Odyssey House. I was notified at the same  
5 time that Odyssey House had reached the unequivocal  
6 determination that it couldn't keep Mr. Simons as a resident  
7 in its facility.

8 It was arranged that the return of Mr. Simons  
9 be postponed from Friday, the 13th, until today, and for  
10 the relative convenience and comfort of everybody involved  
11 instead of going to Odyssey House and then to here, Mr.  
12 Simons was brought from Bellevue to here, and which brings  
13 us to the situation we have confronted.

14 I am now ready, having ordered the revocation  
15 of Mr. Simons' probation, to impose sentence of the kind  
16 that we have been talking about.

17 MR. MITCHELL: Your Honor, I think in order to  
18 protect the record the defendant technically would be  
19 entitled to a hearing on his violation of probation.  
20 He stood ready to admit to the charges. I think to protect  
21 the record both for myself and your Honor if the Clerk  
22 would read the charges he would admit his specification,  
23 having consulted with me, and that would obviate any  
24 possibility at a later date of him saying he didn't get  
25 a hearing on it.



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THE COURT: All right.

Do you understand that, Mr. Simons?

MR. SIMONS: Yes.

THE COURT: The charge is very simply, I don't even need bother the Clerk for this, that you have technically violated, as this thing says --

DEFENDANT SIMONS: Caused my own dismissal.

THE COURT: More correctly be unable to fulfill the special condition of probation in that you have not been able to remain at Odyssey House for treatment of the kind that they had hoped they could give you but discovered they couldn't give you, and I take it that in this conversation you have agreed that that is correct.

DEFENDANT SIMONS: Yes, your Honor, but I think that --

MR. MITCHELL: Don't qualify it.

DEFENDANT SIMONS: I won't qualify it. I just think after I have been at Springfield for a while I will be ready to return to Odyssey House if they would be willing to accept me.

MR. MITCHELL: That has nothing to do with it.

DEFENDANT SIMONS: I am not disputing the charge.

THE COURT: That won't be in my hands. Nothing we say here would prevent Odyssey House, if they find that

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2 that is appropriate, from taking you, and we can cope  
3 with that if and when they are ready to talk, but once  
4 you go from here when we have done as I think we have  
5 the best we could in your case you must understand that  
6 other authorities who are better equipped to consider  
7 such matters will be in charge of that question, and we  
8 won't -- I won't.

9 DEFENDANT SIMONS: Yes, but I would like to ask  
10 one last question, and that is this. I don't understand  
11 the relationship between the psychiatrist authorizing  
12 me for release from the hospital and the meeting of the  
13 Parole Board.

14 If the psychiatrists come to a decision on  
15 a given date I should be released will they then call a  
16 special meeting of the Board or do they occur at regular  
17 intervals? What is the situation?

18 THE COURT: He doesn't make a decision that  
19 you should be released. He makes a decision whether he  
20 thinks you are fit to be released. It is the Parole  
21 Board that makes that decision.

22 DEFENDANT SIMONS: What I don't understand is the  
23 scheduling.

24 THE COURT: The scheduling is also for the Parole  
25 Board, and I can't give you a schedule. They will schedule



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2 your case when they think it is appropriate, and that  
3 is the best I can tell you.

4 DEFENDANT SIMONS: That is what I am trying to  
5 understand. Does the Board meet in response to the psychia-  
6 trist's statement or is there no relationship?

7 MR. MITCHELL: A parole officer is at  
8 Springfield once a month, I don't know the date. One  
9 officer appears at Springfield once a month. If the  
10 psychiatrists deem that you are sufficiently ready to return  
11 to society, they will advise the Parole Board. The  
12 first opportunity the Parole Board meets. What the  
13 Parole Board knows nobody knows.

14 DEFENDANT SIMONS: That answers my question.

15 MR. O'HARE: In order to satisfy Mr. Simons'  
16 prior question, he could mention to them and I believe they  
17 would pick it up at Springfield, if he was still drug  
18 dependent, and they could make that a special condition  
19 of his release that he attend Odyssey House as a parolee,  
20 at which time we would pick him up again.

21 THE COURT: The point is he will have to take  
22 that up with them. They know about Odyssey House at  
23 least as much as we do.

24 DEFENDANT SIMONS: There is one point I would like  
25 to make and that is I have not used any illegal drugs for

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2 seven months and I have no intention of using them ever  
3 again.

4 THE COURT: I hope you keep that up, and I hope  
5 you get your other problems no less under control, Mr.  
6 Simons.

7 The Court will impose on Mr. Simons, having revoked  
8 his probation, a prison term of four years, with the  
9 provision that under Section 4208(a)(2) of Title 18 he should  
10 be eligible for parole at any time the Parole Board may  
11 determine.

12 The Court, on the history recited on this record,  
13 and on materials that I am sure will be made available  
14 to the Bureau of Prisons by the probation office, strongly  
15 recommends the facility at Springfield, Missouri, as the  
16 place of Mr. Simons' incarceration, the thought being  
17 that is is an obvious case for psychiatric treatment of  
18 the kind that we would hope is available at that facility.

19 If he is not transferred to Springfield, Mr.  
20 Mitchell, I think it is proper for me to direct that  
21 you, within the period allowed by Rule 35, make a motion  
22 for reduction or reconsideration of his sentence in light  
23 of that situation.

24 Finally, because I think the statute requires  
25 this, the judgment will provide a special parole term of



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2 three years to commence after Mr. Simons' release from  
3 confinement, and that is a kind of probation specification,  
4 Mr. Simons, that the law under which you were prosecuted  
5 requires the Court to impose.

6 MR. O'HARE: Would that commence upon expiration  
7 of confinement, your Honor?

8 THE COURT: Yes.

9 Is there anything else at this time,  
10 gentlemen?

11 MR. PUTZEL: No, your Honor.

12 THE COURT: All right. I hope you make it, Mr.  
13 Simons.

14 DEFENDANT SIMONS: I intend to, your Honor.

15 (Hearing concluded.)  
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